BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103

In The Matter of	)	
	)	
Leed Foundry, Inc.,	)	**Docket Nos. RCRA-03-2004-0061**
	)	**CWA-03-2004-0061**
Respondent	)	
	)	

COMPLAINANT'S MOTION
TO STRIKE RESPONDENT'S DEFENSE THAT ITS WASTE FALLS WITHIN THE "BEVILL EXEMPTION" TO THE RESOURCE CONSERVATION AND RECOVERY ACT

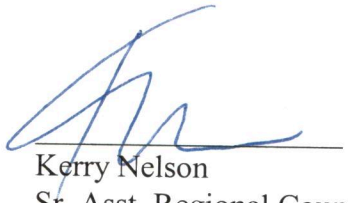
Respondent, Leed Foundry, Inc., has generated waste which contains toxic levels of lead and cadmium. Rather than responsibly disposing of this waste, Respondent has dumped it in a big pile on its property.

Now that EPA has discovered the toxic waste pile and brought an action seeking penalties for this egregious violation, Respondent asserts that the toxic waste pile it created cannot be regulated under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S. C §§ 6901-6922, because it is a "Bevill exempt" waste. See Answer, ibid. The "Bevill" exemption, however, is wholly inapplicable to Respondent's waste.

For the reasons explicated further in the accompanying memorandum Complainant

respectfully requests this tribunal strike Respondent's purported "Bevill" defense and prohibit all reference to the same in subsequent motions and the hearing in this case.

Respectfully submitted



Kerry Nelson
Sr. Asst. Regional Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this date the original and one copy of Complainant's Motion to Strike Respondent's Defense that Its Waste Falls Within the "Bevill Exemption" to the Resource Conservation and Recovery Act and the Memorandum in support thereof was filed with the Regional Hearing Clerk, US EPA Region III, and that a copy was served upon each entity below by first class mail:

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MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S DEFENSE THAT ITS WASTE FALLS WITHIN THE "BEVILL EXEMPTION" TO THE RESOURCE CONSERVATION AND RECOVERY ACT

I. INTRODUCTION

Respondent, Leed Foundry, Inc., owns and operates a gray iron foundry in St. Claire, Pennsylvania. For several years it has generated waste from its firing of scrap metal. Respondent knew, from its own testing of this waste that it contained very high levels of lead and cadmium. Respondent, however, did not responsibly dispose of this waste. Instead it dumped the toxic waste in a big pile on its property where the material was subject to dispersal in the environment by wind and water and where it was also in close proximity to Respondent's workers. Furthermore, Respondent never even notified the Environmental Protection Agency ("EPA") of the existence of this toxic waste pile, thus depriving EPA of the ability to address the risks it posed.

Now that EPA has discovered the toxic waste pile and brought an action seeking penalties

for this egregious violation, Respondent asserts that the toxic waste pile it created cannot be regulated under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S. C §§ 6901-6922, because it is a "Bevill exempt" waste.

Respondent's attempt to shield itself for its longstanding bad acts, however, is entirely off base. It is true that language in the 1980 amendments to RCRA exempted certain enumerated categories of wastes from being regulated as hazardous wastes – until such time as the Environmental Protection Agency ("EPA") conducted a study of those wastes, reported to Congress on the results of the study and made a determination as to whether such wastes should or should not be treated as hazardous. But, EPA has conducted its study, it has reported to Congress and it has determined which wastes fall within the scope of this exemption. Dusts from the melting of scrap metals at gray iron foundries are not among them. Such wastes are not "Bevill exempt."

II. FACTS AND PROCEDURAL HISTORY

Respondent, Leed Foundry, Inc., owns and operates a gray iron foundry in St. Claire, Pennsylvania at which it produces gray iron castings from scrap metals. Answer at Paragraphs 11,12. It does this by melting a scrap metal in a large coke-fired furnace termed a cupola. Answer at Page 4. This process generates several waste streams. One waste stream consists of materials which rise up the flue of the cupola during the process. Attached to the flue is an air pollution control device, termed a baghouse, that collects particulate matter, or dust, by filtering the gas stream through a fabric filter bag. See Answer at Paragraph 13. The particulates are then dropped from the baghouse into a hopper below. Answer at Paragraph 14.

The baghouse dust contains high levels of lead and cadmium. Tests conducted by or for Respondent itself, showed its baghouse dust to contain 800 mg/l, 210 mg/l, 10.7 mg/l, 11.3 mg/l and 6.85 mg/l of lead. Similarly, tests conducted by or for Respondent showed its baghouse dust to contain 3.7 mg/l and 2.0 mg/l of cadmium. Affidavit of Kenneth J. Cox, attached hereto as Exhibit ("Ex.") A; see also Answer at Paragraph 21 (relying on the proposition that "The analytical reports speak for themselves . . . ."). The regulatory level for lead is 5.0 mg/l. 40 C.F.R. §261.24(a). The regulatory level for cadmium is 1.0. 40 C.F.R. §261.24(a). In addition, tests of the baghouse dust conducted for the Environmental Protection Agency ("EPA") showed lead levels that ranged from 276 mg/l to 926 mg/l and levels of cadmium that ranged from 3.02 mg/l to 10.2 mg/l. Cox Affidavit, Ex. A.

Although generation of this baghouse dust is an inevitable result of its process, Respondent has made no attempt to properly dispose of this waste stream. Instead, Respondent's practice has been to empty the hopper containing this toxic dust into a big pile behind its facility, which Respondent now euphemistically calls a "staging area." Answer at 14.

EPA inspectors discovered this toxic pile during a routine inspection. Id. Since that time, state and federal officials have required the facility to clean up the pile. See Complaint at Paragraph 143e (requiring Respondent to submit a closure plan to the Pennsylvania Department of Environmental Protection ("PADEP")). The United States Environmental Protection Agency filed a Complaint on September 30, 2004 seeking, inter alia, penalties from Respondent for its violations of the law.

In its Answer, dated October 29, 2005, Respondent asserts that the toxic waste pile it created at its facility over the course several years falls within an exemption to the Resource

Conservation and Recovery Act, 42 U.S. C §§ 6901-6922. Answer, ibid. The exemption, at RCRA § 3001(b)(3)(A), 42 U.S.C. § 6921(b)(3)(A), was enacted as part of the 1980 amendments to the Solid Waste Disposal Act. It provided that the EPA could not treat as "hazardous," and therefore could not regulate under Subtitle C of RCRA, certain enumerated categories of wastes until such time as EPA conducted a study of those wastes, reported to Congress on the results of the study and made a determination as to whether such wastes should or should not be treated as hazardous. Respondent asserts that its toxic wastes fall within one of these enumerated categories, i.e., the fossil fuel combustion category, RCRA § 3001(b)(3)(A)(i), 42 U.S.C. § 6921(b)(3)(A)(i). Thus, argues Respondent, its wastes cannot be regulated as hazardous and therefore it cannot be found in violation, despite having created a toxic pile of wastes. Answer at Paragraph 14 (acknowledging creation of waste pile). Complainant asks this tribunal to strike this purported defense, which is repeated throughout Respondent's Answer, including at paragraphs 1, 2 and 3 of the section entitled "Additional Bases on Which Respondent Challenges the Action."

III. STATUTORY AND REGULATORY BACKGROUND

In 1976 Congress enacted RCRA. Subtitle C of that Act, 42 U.S.C. §§ 6921-31, provided for a "cradle to grave" system regulating the generation, storage, treatment and disposal of hazardous wastes. Pub. L. No. 94-480, 90 Stat. 2795.[1]

In 1980 RCRA was amended, *inter alia*, to exempt certain categories of wastes from

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[1] Subtitle D, in contrast, provided for regulation of non-hazardous solid wastes. 42 U.S.C. §§ 6921-31.

coverage under the Subtitle C requirements. This new exemption, called the "Bevill Amendment" after Congressman Bevill of Alabama, applied to the following categories of wastes:

> (i) Fly ash waste, bottom ash waste, slag waste and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.
>
> (ii) Solid waste from the extraction, beneficiation and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.
>
> (iii) Cement kiln dust waste.

42 U.S.C. § 6921(b)(3)(A).

The exemption was temporary, extending until EPA had completed a congressionally mandated study of each enumerated category of wastes to determine factors such as the source and volumes for each category of materials, then-current disposal methods, potential risks to human health and the environment from disposal or reuse of such materials, alternatives to then-current disposal methods, the costs of those alternatives, etc. RCRA §§ 3001(b)(3)(A), 8002(f)(n)(o)(p), 42 U.S.C. §§ 6921(b)(3)(A), 6982(f), (n), (o), (p). The amendment further required that EPA prepare a report of its findings for each category and present that report to Congress within certain specified time periods. Id. Following that submission, and after taking public comment, EPA was required to either determine to promulgate Subtitle C regulations for each category of materials, or determine that such regulations were not necessary. RCRA 3001(b)(3)(C), 42 U.S.C. § 6921(b)(3)(C).

This amendment had its genesis in the EPA position (enunciated in a 1978 proposed rulemaking) that some wastes, although technically meeting the definition of a "hazardous waste" under the then-newly proposed Subtitle C regulations, presented issues different from

most other hazardous wastes. These wastes were generated in very large volumes, but were thought to present relatively low hazard. They were believed not to be amenable to the control techniques then being promulgated for hazardous wastes. For these reasons, EPA announced that it intended to regulate these "special wastes," i.e., cement kiln dust, utility wastes (fly ash, bottom ash, scrubber sludge), phosphate mining and processing waste, uranium and other mining waste and gas and oil drilling muds and oil production brines, in a less rigorous manner. 42 Fed. Reg. 58946, 991-92, 59015 (1978).

Before those Subtitle C regulations become effective, however, Congress passed the Solid Waste Disposal Act of 1980, Pub. L. No. 96-482, 94 Stat. 2334, including the Bevill Amendment, which, as noted above, provided a specific regime for addressing the then-identified special wastes: study, report and determine.

Congress acknowledged that its intent in adopting the Bevill Amendment was to emplace in the RCRA statute, EPA's concept of "special wastes." The Conference Committee Report noted that the Amendment applied to all "wastes in a category called 'special wastes' in regulations proposed by the Agency under Subtitle C on December 18, 1978." H.R. Conf. Rep. No. 1444, 96th Cong. 2d Sess. 32 (1980). Moreover, Congressman Bevill specifically indicated that his amendment was meant to embody EPA's "special waste" concept. He noted EPA's pronouncement that it possessed little information on "these wastes" and lacked information on the practicability of regulating them under Subtitle C. Congressman Bevill explained that his amendment would require EPA to study "these coal by-product wastes" and the other identified materials. 26 Cong. Rec. 3361 (1980) . In addition, other members of Congress, including Representative Santini and Representative Staggers, stated that the materials covered by the

Amendment were to be consistent with those EPA had termed "special wastes." Id. at 3348-49, 3365.

EPA did not perform the Congressionally mandated studies by the dates required by the Act. As a result, citizen groups brought suit. Of relevance to the instant matter, is a suit by citizens against EPA for failing to study and make a determination regarding fossil fuel wastes. EPA entered into a consent decree to resolve this litigation. Gearhart et al. v. Reilly et al., No. 91-2435 (D.D.C., June 30, 1992), Ex.B. Under the consent decree EPA was required to study the wastes subject to the Bevill "Fossil Fuel Combustion" (or "FFC") exemption and make a determination (i.e., whether to regulate them under Subtitle C) in two parts. EPA was to study and, by August 2, 1993, make a determination regarding FFC wastes from electric utilities. EPA was also to study and make a determination for the "remaining wastes" that fell under the umbrella of this Bevill exemption by April 1, 1998. Id.

EPA prepared a report to Congress ("1993 Report to Congress") regarding the first group of FCC wastes, i.e., four high-volume wastes - fly ash, bottom ash, boiler slag and flue gas emission control waste - from combustion of coal at electric utility power plants (including independent facilities that produced power, but were not engaged in any other industrial activity). 58 F.R. 42466, 42467 (August 9, 1993). This study was limited in several ways. First, it included only electric utility power plants. Second, it looked at facilities which burned only coal. Third, it included only these four high volume combustion wastes if they were managed separately from other wastes. Id. at 42469. Thereafter, in 1993, EPA published its regulatory determination ("1993 Determination") for these wastes, id., which came to be referred to as "Utility Coal Combustion Wastes" or "UCCWs." Id. In the 1993 Determination, EPA noted that

the Utility Coal Combustion Wastes "rarely" exhibit any characteristics of hazardous waste. Id. at 42,476. EPA concluded, therefore, "that regulation under Subtitle C of RCRA is inappropriate" for these utility wastes. Id. at 42,466. EPA also noted that it would make a "final regulatory determination on the remaining FFC waste streams" subject to the FCC Bevill exemption by April 1, 1998. Id.

Thereafter, the Agency completed its study of and reported the results to Congress on the remaining FFC wastes. *Report to Congress on Wastes from the Combustion of Fossil Fuels,* March 1999. The Report to Congress covered all remaining wastes subject to sections 3001(b) and 8002(n) of RCRA. *Report to Congress on Wastes from the Combustion of Fossil Fuels, Volume 2 - Methods, Findings, and Recommendations, Section 1.1 Background of Report, page 1-1*, March 1999 ("1999 Report to Congress" or "1999 RTC"), Ex. C. Whereas the 1993 Report to Congress had looked only at Utility Coal Combustion Waste, i.e., waste from the combustion of coal that was managed separately from other wastes, the 1999 Report to Congress included wastes from non-utilities, wastes generated by burning of other materials with fossil fuels, and mixtures of wastes from fossil fuel combustion and from other waste streams. In particular, EPA identified the scope of these materials as:

(1) Utility coal combustion wastes "mixed with, codisposed, cotreated or otherwise comanaged with other wastes generated in conjunction with the combustion of coal or other fossil fuels." EPA termed these "Comanaged Utility Coal Combustion Wastes."

and

(2) "Any other wastes subject to Section8002(n) of RCRA, except fly ash, bottom ash, boiler slag, and flue gas emission wastes from coal combustion by electric utilities."

EPA explained that this second group included:

- Wastes from the combustion of mixtures of coal and other fuels ("coburning") by utilities
- Wastes from the combustion of coal by non-utilities
- Wastes from fluidized bed combustion of fossil fuels (by utilities and non-utilities)
- Wastes from the combustion of oil (by utilities and non-utilities)
- Wastes from the combustion of natural gas (by utilities and non-utilities)

Id. at Section 1.2 Purpose and Scope of Report, page 1-1 - 1-2.

According to the 1999 Report to Congress, the first subcategory of wastes studied included both "comanaged" and "coburned" UCCWs. Comanaged wastes were the UCCWs when mixed with "other wastes that are generated ancillary to, but as a necessary part of, the combustion and power generation processes." Id. at Section 3.0 *Comanaged Wastes at Coal-Fired Utilities*, page 3-1.[2] EPA found that the comanaged wastes had very low levels of RCRA constituents.

The "coburned" wastes were those produced when the utility burned a combination of coal and up to 50 percent other fuels. Id. at Section 3.1.3. *Fuel Types*, page 3-9.[3] EPA found that although leachates for coburned wastes could have higher levels of some metals, with few exceptions coburned wastes had leachate levels similar or below those for UCCW. Id. at Section 3.2.3 *Wastes from Coburning Coal and other Fuels*, page 3-20.

EPA concluded that the wastes in this subcategory, "including petroleum coke

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[2] The ancillary processes were listed as coal storage, coal processing, steam generation, cooling, water treatment, cleaning and maintenance and wastewater treatment. Id. at Section 3.1.4. *Supporting Processes*, page 3-9.

[3] The study noted that "[t]he types of materials that have been co-burned in such mixtures include . . . Agricultural refuse, Auto shredder fluff, Bark and other wood, Biomass, Boiler cleaning wastes, Contaminated soils and other wastes from manufactured gas plant sites, Mill rejects, Oil combustion wastes, Paper mill sludges, Peat, Petroleum coke and petroleum coke/limestone blends, Railroad ties, Refuse derived fuel, Regeneration waste streams, Sewage sludge, Straw, Tire derived fuel, Used oil." Id. at Section 3.1.3 Fuel Types, page 3-9.

combustion wastes as well as wastes from other fuels co-fired with coal, generally present a low inherent toxicity, are seldom characteristically hazardous, and generally do not present a risk to human health and the environment." Id. at Section 3.9.3 *Recommendations*, page 3-73.

The second subcategory was Non-Utility Coal Combustion Waste. These were wastes from commercial, industrial, and institutional facilities combusting fossil fuels in boilers for power generation, hot water, space heating and manufacturing process steam generation. Id. at Section 4.0 *Non-Utility Coal Combustion Wastes*, page 4-1; Section 4.8.2 *Findings*, page 4-31. The 1999 Report to Congress looked both at the high volume wastes, i.e., fly ash, bottom ash, boiler slag and flue gas emission control waste, id. at Section 4.8.2 *Findings*, page 4-31, as well as ancillary wastes generated as a necessary part of the combustion and power generation processes, see id. at section 4.1 *Waste Generation*, page 4-3 - 4-4. As with the utility sector, entities in this non-utility subcategory used conventional boiler combustion. Id. at Section 4.1.1 *Boiler Technology*, page 4-4.

EPA believed that non-utility coal combustion waste was similar to UCCW and that the effect of burning other fossil fuels, such as coke, by non-utility combusters was expected to be similar to that of utility combusters. Id. at Section 4.2 *Waste Characteristics*, page 4-9. EPA also believed that the risks associated with non-utility coal combustion wastes which were managed with the ancillary wastes, were similar to those for comanaged UCCW. Id. at 4.2 *Section Waste Characteristics*, page 4-9, see also, id. at Section 4.8.2, *Findings*, page 4-32. EPA noted that, '[B]ased on available characterization data . . . non-utility [wastes] are seldom expected to fail the hazardous waste characterization tests." Id. at Section 4.5.3 *Regulations Addressing Solid and Hazardous Waste*, page 4-23. The Agency also examined risks associated with human and

environmental receptors and reported that "non-utility [wastes], including wastes from petroleum coke combustion and from other fuels that are co-fired with coal, and also low-volume wastes where they are managed with the combustion wastes, generally present a low inherent toxicity, are seldom characteristically hazardous, and generally do not present a risk to human health and the environment." Id. at Section 4.8.3 *Recommendations*, page 4-33.

The third subcategory studied in the 1999 Report to Congress was Fluidized Bed Combustion Waste. These were wastes generated generally by utilities. The technology was somewhat different than that used by the utilities previously studied, however, because in fluidized bed combustion ("FBC") boilers, air was forced upward at high velocities through a bed of incombustible material (such as sand and limestone). Id. at Section 5.1.1 *Fluidized Bed Combustion Technology*, page 5-4. The FBC facilities studied used a range of fossil fuels including petroleum coke. Id. at Section 5.1.3 *Fuel and Sorbent Use*, page 5-7. Again, after looking at risks posed to human health and the environment by these wastes, EPA found that "FBC wastes seldom test characteristically hazardous," that there was a "lack of potential human health risk for virtually all waste constituents" and identified "no ecological risks associated with the management of FBC wastes." Id. at Section 5.8.2 *Findings*, pages 5-33 - 5-44.

The fourth subcategory was oil combustion waste. The technologies employed by facilities in this subcategory were both boilers and turbines. Id. at Section 6.1.1 *Combustion Technology*, page 6-5. EPA found that oil combustion waste exhibited toxicity on an infrequent basis. Id. Section 6.2.3 *Leaching and Hazardous Waste Characteristics*, page 6-11 - 6-13.

Finally, EPA considered natural gas combustion waste. Gas combustion technologies were similar to that for oil combustion, e.g., steam electric boilers. The Agency noted, however,

that because natural gas contains negligible ash, combustion of gas generates virtually no solid waste thus rendering a detailed discussion of each of the RCRA Section 8002(n) study factors moot. Id. at Section 7.1 *Technology*, page 7-1 - 7-2, Section 7.2 *Findings and Recommendations*, page 7-2.

EPA gave public notice of and requested comments on the 1999 Report to Congress. 64 F.R. 22,820 (April 28, 1999). In that Federal Register notice, EPA noted that it proposed to continue the exemption for all categories of remaining wastes.[4] Id. at 22,821. Thereafter, the Agency extended the deadline for public comment until September 24,1999. 64 F.R. 50,788. EPA received 220 public comments on the 1999 RTC. 65 F.R. 32,214, 32,219 (May 22, 2000). EPA considered those comments in arriving at its final determination. See, 65 F.R. at 32,216 (new information on instances of damage from such wastes provided and considered).

On May 22, 2000, EPA published its Final Regulatory Determination on Wastes from the Combustion of Fossil Fuels. 65 F.R. 32,214. This determination applied "to all remaining fossil fuel combustion wastes other than high volume coal combustion wastes generated at electric utilities and independent power producing facilities and managed separately, which were addressed by a 1993 regulatory determination." Id. at 32214; see also id. at 32218 ("Today's regulatory determination is the second phase of our effort, or the Part 2 determination. It covers all other fossil fuel combustion wastes not covered in Part 1.") The determination provided a discussion of the findings of the 1999 RTC, public comment on those findings, EPA's consideration of those comments and EPA's final determination. The Agency determined not to

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[4] For coal combustion wastes used in agricultural applications and that for oil combustion wastes it was considering either regulatory or voluntary controls. Id. at 22,821.

regulate, under Subtitle C of RCRA, any of these "remaining" FFC wastes, but stated that national regulations under Subtitle D of RCRA were warranted for coal combustion wastes that are landfilled or used to fill surface or underground mines.[5] The Agency decided, however, that any new Subtitle D regulations should not apply to FFC wastes that were put to beneficial use other than mine filling (e.g., additions to cement and concrete products), id. at 32,214, and that no regulations should be developed for oil or natural gas combustion wastes, id. at 32,214. As of this time, no new Subtitle D regulations have been promulgated.

IV. STANDARD

40 C.F.R. § 22 does not enunciate a specific standard for motions to strike defenses. Therefore, administrative tribunals tend to look for guidance to federal law. See, e.g., In re Iowa Turkey Growers Cooperative, 2002 EPA ALJ LEXIS 31 (2002) (referring to F.R. Civ. P. 12(f) by analogy) ; In re Lazarus, Inc., 7 E.A.D. 318, 330 n.25 (E.P.A. 1997) (noting that the Board has looked to the Federal Rules of Civil Procedure as aid in interpreting the Consolidated Rules).

Federal Rule of Civil Procedure 12(f) provides that the court may strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." F.R. Civ. P. 12(f). A motion to strike under Rule 12(f) is the "primary procedure" for objecting to an insufficient affirmative defense. 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1380 at 782 (1969). Thus, "even though motions to strike are often viewed with disfavor because of their potential to be used as a dilatory tactic, they do serve a useful purpose

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[5] EPA also stated its intention to apply such national regulations to the wastes which were the subject of the 1993 determination.

by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues which would not affect the outcome of the case." United States v. Marisol, 725 F. Supp. 833, 836 (M.D. Pa. 1989) (citing United States v. Geppert Bros., Inc., 638 F. Supp. 996, 998 (E.D. Pa. 1986)).

Courts possess considerable discretion in weighing Rule 12(f) motions. Miller v. Group Voyagers, Inc., 912 F. Supp. 164, 168 (E.D. Pa. 1996). In general, to prevail on a motion a strike, a movant must show that there is no genuine issues of disputed material fact, Iowa Turkey Growers Cooperative, 2002 EPA ALJ LEXIS 31, at *1, and that the defense is insufficient as a matter of law. In the Matter of Century Aluminum of West Virginia, Inc., 1999 EPA ALJ LEXIS 26, at *1 (1999).

V. ARGUMENT

A. Respondent's Toxic Waste Pile is Not Within the Scope of the "Bevill Exemption" or EPA's Determination to Exempt Certain Wastes from RCRA Subtitle C Regulation

Respondent's assertion that the Bevill Amendment automatically exempted Respondent's toxic wastes from RCRA regulation, unless and until EPA promulgated regulations specifically addressing its wastes, is a grievous misapplication of that statutory provision. Neither the Bevill Amendment nor EPA's Regulatory Determination apply to Respondent's toxic baghouse dust.

The Bevill Amendment, RCRA §3001(b)(3)(A)(C), 42 U.S.C. §6921(b)(3)(A)(C), singled out for special treatment three categories of wastes, including the "fossil fuel combustion" ("FFC") waste category Respondent points to here. It directed that those wastes not be regulated under Subtitle C of RCRA until EPA studied those categories of wastes, made a

determination whether they should be treated as hazardous wastes or not and, if the determination was that they should be so treated, promulgate regulations to do so. Id.; see also RCRA §8002(f)(n)(o)(p), 42 U.S.C. §6982(f)(n)(o)(p). EPA has followed Congress's directive. It studied the FFC wastes, submitted the results to Congress in the form of the 1993 and 1999 Reports to Congress. It made a determination that the FFC wastes should be exempt from Subtitle C regulation. 58 F.R. 52566; 65 F.R. 32214. That process, now complete, makes clear that FFC wastes are exempt from Subtitle C regulation. As even Respondent concedes, its waste is not among those.

Respondent seems to imply that because EPA did not study Respondent's particular waste it cannot be regulated under Subtitle C – unless and until the Agency studies it and then promulgates regulations specific to it. See Answer at 12. This is a blatant misapplication of the Bevill Amendment. The Amendment charged EPA with studying those wastes that fell within the scope of the Amendment, not as Respondent asserts, "**all** 'fly ash waste,'" Answer at 3, no matter how generated, no matter how hazardous and no matter what risk it posed to human health and the environment. Such an interpretation is absurd. EPA has studied all wastes within the scope of the Amendment and has been clear through the many years of study, reporting, public notification and determination processes that it was doing so and was making a "final" determination for FCC wastes.

First, the Bevill Amendment was never intended to exempt every waste generated by burning of fossil fuel, regardless of its source or nature. That Amendment singled out for special treatment three categories of very high volume, low hazard wastes, including the "fossil fuel combustion" ("FFC") waste category Respondent points to here. These categories were meant to

be consistent with three categories of "special wastes"[6] that had been identified by EPA in 1978.[7] With respect to FFC wastes, EPA had noted in 1978 that utilities which were powered by fossil fuels generated wastes (fly ash, bottom ash, scrubber sludge) in very high volumes. And, the Agency believed, these wastes were of low hazard and were not amenable to the standards proposed for storage, treatment and disposal for hazardous wastes. 42 Fed. Reg. 58946, 991-92, 59015 (1978). As a result, Congress adopted the Bevill Amendment, which required EPA to study and make a determination for, inter alia, "Fly ash waste, bottom ash waste, slag waste and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels," RCRA §3001(a), (c), 42 U.S.C. § 6921(a), (c), based upon EPA's concept of the FFC "special wastes."

Second, EPA has followed Congress's directive. It studied all the wastes within the scope of the Bevill FCC exemption. It did so in detail, even performing a two stage investigation. It provided specific findings to Congress. The results from study of the first group of wastes, the Utility Coal Combustion Wastes or UCCWs, were enunciated in detail in the 1993 Report to Congress. EPA notified the public of the availability of this information, took public comment and published a formal determination that the UCCWs should not be subject to Subtitle C regulation. 58 F.R. 42466, 4268. EPA studied the second group of FFC wastes called "the

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[6] 42 Fed. Reg. 58,946, 991-92 (1978) (EPA identification of "special wastes").

[7] H.R. Conf. Rep. No. 1444, 96th Cong. 2d Sess. 32 (1980) (categories of wastes included in Bevill Amendment embodied EPA's concept of "special wastes"); 26 Cong. Rec. 3361, 3348-49, 3365 (1980) (same) Solite Corp. v. U.S.E.P.A. et al., 952 F.2d 473 (D.C.Cir. 1991) (acknowledging Bevill Amendment represented Congress's intent to base exemption on EPA's construct of "special wastes"); Environmental Defense Fund v. EPA et al., 852 F.2d 1316, (D.C. Cir. 1988) ("Congress's intent is the concept of 'special waste' articulated in the regulations proposed by EPA on December 18, 1979 . . .").

remaining wastes" in detail. It embodied its findings in a lengthy report which it presented to Congress in 1999. 1999 Report to Congress. The Agency gave the public notice of that study and report. 64 F.R. 22820; 64 F.R. 50788. After this detailed and lengthy public process, EPA determined that the remaining FCC wastes should not be subject to Subtitle C regulation. 65 F.R. 32214. In the Report to Congress and in the public notice EPA was clear that its process was a comprehensive one in which it studied not just some of the wastes that might potentially be subject to the Bevill FCC exemption, but all wastes potentially subject to that exemption.[8]

EPA has studied, reported to Congress, taken public comment and made a final determination on all wastes falling within the scope of the Bevill FCC provision. Respondent's toxic baghouse dust is not among those wastes. It is not exempt from Subtitle C regulation.

B. Respondent Misstates EPA's Actions in Seeking to Penalize Respondent For Its Complete Failure to Properly Manage its Toxic Waste

In its Answer, Respondent appears to claim that by bringing this action against it, EPA is attempting to change, by fiat, the scope of the Bevill exemption. Respondent inaccurately represents that EPA's position, until the filing of the Complaint in this case, had been that "'utility-generated fly ash is the only Bevill exempt fly ash.'" Answer at 3. This is simply untrue.

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[8] 1999 Report to Congress, Section 1.1 *Background of Report*, page 1-1 (EPA followed process for completing regulatory determinations for "all" FFC wastes by first looking at fly ash, bottom ash, boiler slag and flue gas emission control waste from utilities and then studying "all remaining wastes subject to RCRA Sections 3001(b) and 8002(n)."); 65 F.R. 32214 (EPA's Final Regulatory Determination applied to "all remaining fossil fuel combustion wastes other than high volume coal combustion wastes generated at electric utilities and independent power producing facilities and managed separately, which were addressed by a 1993 regulatory determination.") emphasis added; id. at 32218 ("Today's regulatory determination is the second phase of our effort, or the Part 2 determination. It covers all other fossil fuel combustion wastes not covered in Part 1.") emphasis added.

EPA's study of FCC waste looked at both utility and non-utility waste. As documented by the 1999 Report to Congress, EPA studied wastes from non-utilities, in particular wastes from commercial, industrial, and institutional facilities combusting fossil fuels in boilers for power generation, hot water, space heating and manufacturing process steam generation. 1999 RTC at Section 4.0 *Non-Utility Coal Combustion Wastes*, page 4-1, Section 4.8.2 *Findings*, page 4-31. Not only did EPA study such wastes, but in the Final Regulatory Determination EPA concluded all those wastes should be exempt from Subtitle C. 65 F.R. 32214. Similarly, EPA's study was not limited to wastes produced solely from the combustion of coal. Rather it looked at wastes produced from the burning of fossil fuels and up to 50% other materials including wood and biomass, petroleum coke, peat mixtures, etc. 1999 Report to Congress at Section 3.1.3 *Fuel Types*, page 3-9, Section 3.2.3 *Wastes from Coburning Coal and other Fossil Fuels*. In the Final Regulatory Determination EPA concluded all of these wastes should be exempt from Subtitle C as well. Id.

Respondent itself acknowledges that EPA has the authority to determine the scope of the exemption. See, Answer at Section "Introduction", page 4 ("So we are clear, Leed does not challenge EPA's ability to carve certain type of fly ash waste out of the Bevill exemption by appropriate rulemaking . . . ."). EPA did so in a comprehensive and public fashion long before the pendency of this case. Respondent's waste is not Bevill exempt.

C. EPA Has Previously Addressed Gray Iron Foundry Baghouse Dust Finding that It Falls Outside the Scope of the Bevill Amendment

In the past, EPA has specifically considered how to address baghouse dust from gray iron foundries. EPA's determination has been that any such waste which exhibits a hazardous

"characteristic"[9] is subject to Subtitle C regulation.

In 1980 EPA proposed to identify several types of wastes as "listed" hazardous wastes under RCRA. Baghouse dust from cupolas at gray and ductile iron foundries was one of those proposed. 45 F.R. 47835 (July 16, 1980). EPA considered "listing" baghouse dust from gray iron foundries due to "high concentrations of heavy metals cadmium and lead." Id. Had such waste been "listed," it would have been deemed "hazardous" regardless of whether any particular batch of baghouse dust tested toxic. In the end, EPA decided not to list gray iron foundry baghouse dust at that time. 46 F.R. 4614 (January 16, 1981). In making this decision, however, EPA warned the regulated community that any such wastes which exhibited toxicity, for example due to lead or cadmium, would be considered "hazardous waste" subject to RCRA regulation. Id. ("All of these wastes are hazardous, of course, if they exhibit any of the characteristics of hazardous waste, and generators of these wastes are obligated to make this determination.")

In addition, EPA received at least one direct inquiry from a consultant for a gray iron foundry regarding waste streams produced by its client. In its response to that inquiry, EPA reiterated its position that baghouse dusts from cupolas at gray iron foundries which exhibited the toxicity characteristic were considered hazardous wastes. Letter from C. Perket, Environmental Engineering & Management Limited to J. Lehman, EPA, dated March 9, 1981; Letter from D. Friedman, EPA to C. Perket, Environmental Engineering & Management Limited, dated June 18, 1981, Ex. D.

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[9] Wastes are deemed "hazardous" under RCRA either because they are specifically listed in the regulations as such or because they exhibit one or more hazardous characteristics, i.e., corrossivity, toxicity, ignitability or reactivity. 40 C.F.R. §261.20-.38.

D. The Wheland Case Cited By Respondent Does Not Compel the Conclusion That Respondent's Toxic Baghouse Dust is Bevill Exempt

Respondent holds out the case of In re: Wheland Foundry in support of its claim that its baghouse dust is Bevill exempt. First and foremost, Respondent's reliance on this opinion is clearly misplaced, since it was vacated by the Environmental Appeals Board. 1993 WL 569097 (EPA RCRA-IV-89-25-R, December 22, 1993).

That case is also clearly distinguishable from the matter at hand. Judge Green's opinion in Wheland appears to be motivated by her view of EPA's position – that the exemption applied only to utilities.[10] But, as noted above, the FCC exemption does not apply solely to utilities and EPA does not assert here that it does. Moreover, the Wheland case involved a particular circumstance not present here. In that case, the state of Tennessee had informed the respondent that its waste was Bevill exempt and continued to so inform respondent, even after EPA informed Tennessee very pointedly not to rely on a broad interpretation of the Bevill FCC exemption.[11] When the state finally conceded that the material was not Bevill exempt,

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[10] See, e.g., In re: Wheland Foundry, 1993 WL 569097 at page 4 ([E]PA announced its view that the exemption in the Act and the federal regulations applied only to the utility industry . . . .").

[11] In August of 1984, John Lehman from the Waste Management and Economics Division of EPA wrote a letter responding to an inquiry from a congressional office in which he noted that the Bevill FCC exemption was not limited to utilities. Letter dated August 16, 1984 from J. Lehman, EPA to T. Tiesler, Bureau of Environmental Services for the State of Tennessee ("Tennessee"), Ex. E. However, because he misinterpreted that document, Mr. Tiesler of the State of Tennessee apparently informed the respondent foundry that its waste was Bevill exempt. Shortly thereafter, EPA Region IV (within which Tennessee lies) sent two clarifying letters to Mr. Tiesler informing him of his misinterpretation of the August letter and unequivocally stating that baghouse dust from gray iron foundries had never been exempt from Subtitle C regulation. Letters dated December 28, 1984 from J. Scarbrough, EPA Region IV to T. Tiesler, Tennessee, Ex. F. Those letters enclosed a memorandum from John Skinner, EPA's Director of the office of Solid Waste, also advising Mr. Tiesler not to rely on his interpretation of Lehman's letter as a

respondent very quickly began handling the material has hazardous waste. Id. at page 6. It should also be noted that this case was decided in 1993. As a result, Judge Green did not have the benefit of the fully developed record regarding the scope of the Bevill FFC exemption, including the reports to Congress and the Final Regulatory Determination, as does this court.

VI. CONCLUSION

For the reasons explicated above, Complainant request this tribunal strike any defense, whether equitable or legal, Respondent may proffer based upon the FCC Bevill exemption, RCRA § 3001(b)(3)(A), 42 U.S.C. § 6921(b)(3)(A).

Respectfully submitted

Kerry Nelson
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final application the Bevill FCC exemption. Memo dated November 20, 1984 from J. Skinner, EPA to T. Tiesler, Tennessee, Ex. F.